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In the Supreme Court of the United States

OCTOBER TERM, 1955

JOHN LEE,
Petitioner,

vs.

E. B. SWOPE,
Warden, United States Penitentiary,
Alcatraz, California,
Respondent.

No.....

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, John Lee, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on September 14, 1955.

B. JURISDICTIONAL STATEMENT

This appeal is taken from a judgment of the United States Court of Appeals for the Ninth Circuit, San Francisco, California, entered September 14, 1955, affirming a decree of the United States District Court, Northern District of

California, Southern Division, San Francisco, California, entered October 22, 1954, dismissing petitioner's petition for a writ of habeas corpus for the reason that, "The petitioner does not challenge the validity of the twenty year sentence, which the records show was imposed for a crime committed by the petitioner when he was a member of the United States Army and while stationed in France. The return also shows that the expiration of the twenty-year judgment and sentence with part good time credit will occur on October 24, 1960. It is obvious therefore that the petitioner is being detained by the Warden under a valid sentence. In this situation this Court is clearly without jurisdiction to hear the petition." - - - - "The petitioner challenges the jurisdiction of the Army Court-Martial over the offense at Camp Cooke. He contends he had been dishonorably discharged two years before the offense was committed and therefore the civil, not the military courts, had jurisdiction. His challenge to that sentence is premature, and therefore this Court does not reach the merits of his petition."

This statement is filed for the purpose of showing that this Court has jurisdiction of this appeal, and that it should exercise its jurisdiction because the questions are substantial and involves the interpretation of the United States Constitution, Article I, Section 8, and Amendments V and VI.

We originally claimed jurisdiction under Section 2255 of Title 28, U.S.C. Since appellant is a military prisoner, sentenced by a military court martial, it would apear that Section 2255 does not apply to this proceeding but that Sections 2241, 2242 and 2243 of Title 28, U.S.C. do apply. Appeal in a habeas corpus proceeding is provided by Section 2253 of Title 28, U.S.C.

(A) OPINIONS BELOW

The opinion of the United States Court of Appeals (Appendix A), for the Ninth Circuit, filed September 14, 1955, is unreported, but is found in the record p. 1-3. The opinion of the trial court (Appendix B), filed October 22, 1954, is unreported, but is found in the record p. 34-36.

C. QUESTIONS PRESENTED BY APPEAL

The legal issue involved in this cause is whether the appellant has been denied "due process" under the Fifth and Sixth Amendments to the United States Constitution when the trial court refused to pass on the legal question as to the jurisdiction of the Army Court-Martial which adjudged a life sentence against the appellant on September 13, 1949, although he had been dishonorably discharged from the Army on June 12, 1947, and hence was a "civilian." The trial court refused to accept jurisdiction of this cause on the grounds that appellants' petition for a writ of habeas corpus was pre-mature.

CONCISE STATEMENT OF THE CASE

Appellant is now imprisoned by The Warden, Federal Penitentiary, on Alcatraz Island, California. On October 23, 1942, he was inducted into the U.S. Army. On May 27, 1946, he was court-martialed in Paris, France and sentenced to dishonorable discharge from the Army and twenty years of confinement at hard labor for a robbery and assault. On June 12, 1947, he was dishonorably discharged from the Army and had meanwhile been returned from France to Camp Cooke, California to serve the sentence. On June 10, 1949, three fellow prisoners stabbed another prisoner to death. The petitioner, Lee, took no part in the incident and in fact attempted to prevent it as shown in the Dying Dec-

laration of the victim (Appendix C). Nevertheless, the petitioner was tried by Army General Court-Martial on September 13, 1949, along with the three active participants, and was convicted and sentenced to death. The death sentences which had been adjudged all four prisoners were commuted to life imprisonment to begin to run consecutive upon completion of the then existing sentences. On January 27, 1953, appellant, Lee, became eligible for parole from his twenty year sentence (Appendix D) but he was not considered for such parole because the first sentence of twenty years had merged with the second sentence of life to make one life sentence and hence to deprive the United States Board of Parole of jurisdiction until 1975 (Appendix E). On October 18, 1954, appellant filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of California and an Order was entered on October 22, 1954, dismissing appellant's petition as pre-mature. An appeal was taken from such Order and was heard before the U.S. Court of Appeals for the Ninth Circuit on July 28, 1955. On September 14, 1955, the Court of Appeals rendered an opinion affirming the Order of the lower court to the effect that appellant's petition was premature. It is such order from which this appeal is taken.

E. SPECIFICATIONS OF ERROR

Appellant challenges this ruling as being a denial of due process under the Fifth and Sixth Amendments for the reason that appellant had been a "civilian" for approximately two years prior to the time of the incident which took place in the Army disciplinary barracks at Camp Cooke, California on June the 10th, 1949, for which a life sentence was adjudged, to run consecutive to the then existing twenty year sentence. The trial court erred in denying appellant a hearing on the merits:

1. Appellant was not and is not being imprisoned at this time under a twenty year sentence which will expire on October 24, 1960, but is in fact confined under a "life term" for Robbery and Assault with a Deadly Weapon and Murder," (Appendix C), as a result of the first sentence of twenty years and the second sentence of life having merged into one "life term." This has the effect, as set forth in Appendix C of denying the United States Board of Parole jurisdiction, even though the petitioner became eligible for parole from the first sentence on January 27, 1953.

2. Appellant was a "civilian" on June the 10th, 1949, when the incident which gave rise to his court-martial conviction of September the 13, 1949 took place. Since he had been dishonorably discharged on June the 12th, 1947, he was no longer a member of "the land or naval forces" and hence the Army court-martial which tried and convicted him was entirely without jurisdiction and in direct violation of the Sixth Amendment as concerns, "trial, by an impartial jury of the State and district wherein the crime shall have been committed." *United States of America ex rel, Audrey M. Toth* v. *Donald A. Quarles, Secretary of the United States Air Force,* decided November 7, 1955 by the United States Supreme Court and not yet reported, *Bowen* v. *Johnston, Warden,* 306 U.S. 19. *Jones* v. *United States,* 137 U.S. 202, *United States* v. *Bowman,* 200 U.S. 94, *Skiriotes* v. *Florida,* 313 U.S. 69, *Ex parte Henderson,* 11 Fed Cas 1067, *United States ex rel Flannery* v. *Commanding General,* 69 F. Supp. 661, *United States ex rel Hirshberg* v. *Cooke,* 336 U.S. 210.

3. Not only was appellant denied due process when he was tried by a military tribunal which was entirely without jurisdiction but he was again denied his "right to a speedy and public trial" under the Sixth Amendment when the trial court refused to pass on the legal issue involved in

appellant's petition—whether the Army court-martial which sentenced him on September 13, 1949, did or did not have legal jurisdiction to try him. By refusing to take jurisdiction until October 24, 1960, the trial courts order can have no effect but to prejudice petitioner as to his rights under the Sixth Amendment. If the petitioner is forced to wait until 1960, it is very doubtful if he can ever be afforded a fair trial since "evidence may be lost, witnesses may die or their memories fail, or the delay may work some other prejudice, resulting in a denial of relief." *Commonwealth ex rel Quinn* v. *Smith,* 191 F. 2d 504, *United States ex rel Turpin* v. *Snyder,* 183 F. 2d 742, *Gutterman* v. *Hiatt, Warden,* 65 F. Supp. 285, *Joblonowski* v. *State of New Jersey,* 29 N.J. S. 114, *State* v. *Ballard,* 9 N.J. 402.

F. REASONS FOR ALLOWANCE OF THE WRIT

1. This case involves the Construction and interpretation of Article 1, Section 8 wherein Congress is given the power "to make Rules for the Government and Regulation of the land and naval Forces" and of Amendment V wherein is provided, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces," and of Amendment VI wherein is provided, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

2. Is a person a member of "the land or naval forces" after he has been dishonorably discharged from the Army and is confined in an Army disciplinary barracks in the continental United States, in time of peace, serving a sentence adjudged by court-martial?

3. Is such person subject to trial by Army court-martial

for the alleged civilian offense of murder committed while such discharged prisoner is confined in the Army disciplinary barracks, in time of peace, in Camp Cooke, California?

4. Is such person denied a "speedy" trial when the trial court refused to take jurisdiction on a Petition for Writ of Habeas Corpus so as to pass on the legal issue in this cause at this time but forces the appellant to wait until October 24, 1960, to get a hearing on the legal issue of jurisdiction of the Army to court-martial a dishonorably discharged soldier?

5. Assuming that a final determination should be made ruling that discharged persons serving a sentence adjudged by court-martial are not subject to trial for civilian offenses committed in the continental United States in time of peace, then does the fact that appellant would be forced to stand trial after October 24, 1960, for an offense allegedly committed on June 10, 1949, amount to a denial of a "speedy" trial as provided for in the Sixth Amendment?

CONCLUSION

Wherefore, for the reasons hereinbefore stated, it is respectfully submitted that this Petition for Writ of Certiorari be granted.

Charles Upton Shreve
Carl L. Rhoads
716 Ford Building
Detroit 26, Michigan
WOodward 2-4056

Jack L. Blaine
775 Post Street
San Francisco 9, California
Counsel for Appellant

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

(Filed Sept. 14, 1955)

JOHN LEE,
Appellant,

vs.

E. B. SWOPE,
Warden, United States Penitentiary, Alcatraz, California,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

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Before: STEPHENS, ORR, and CHAMBERS, Circuit Judges

STEPHENS, Circuit Judge

The district court's[1] order here appealed from is as follows:

> "Ordered that petitioner's petition for a writ of habeas corpus be and the same is hereby dismissed without prejudice, and the order to show cause heretofore issued out of this Court is hereby discharged." (Dated and filed October 22, 1954.)

The district court refused relief because the petition for the writ reveals upon its face that even if the petitioner's attack upon the validity of his conviction by a United States

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[1] United States District Court for the Northern District of California, Southern Division.

[Army] Court Martial was upheld, it would not act to release the petitioner from custody, since he is also being held under a former unexpired sentence, the validity of which is not attacked.

Petitioner claims he has been denied "due process" under the Fifth and Sixth Amendments to the United States Constitution, in that the first, or valid sentence, will not expire for around six years and that he may be prejudiced if the validity of the second sentence is not inquired into promptly. The basis for the claim of invalidity is that petitioner was tried by a United States [Army] Court Martial after petitioner had been restored to civilian status, for an alleged offense committed while he was a member of the United States Army.

Petitioner seeks to bolster his claim that the district court should have taken jurisdiction and decided the merits of it, by citing *Gutterman v. Hiatt, Warden,* 1946, D.C. Pa., 65 F. Supp. 285, and *U. S. ex rel. Pruett v. Hiatt,* 1944, 55 F. Supp. 993. Neither of these cases supports the claim. In fact, they are directly against it. It is true the court in the *Gutterman* case, at page 288, said:

> "• • • [it] considered petitioner's contentions as to both sentences in order that he may be fully advised in relation thereto."

The ruling on the point of using habeas corpus in the circumstances was, however, as follows:

> "As already stated, petitioner is restrained by reason of two sentences, either of which considered independently, would not as yet have expired; consequently, if any one of the two sentences is valid, he would not be entitled to immediate release." [citing numerous authorities.] 65 F. Supp. 285, 288.

This court has held to the principle stated in the quotation, in the following cases:

Ex parte Melendez, 9 Cir., 1938, 98 F.2d 791;
McNealy v. Johnston, 9 Cir., 1938, 100 F.2d 280;
Dunlap v. Swope, 9 Cir., 1939, 103 F.2d 19;
Demaurez v. Squier, 9 Cir., 1941, 121 F.2d 960;
Graham v. Squier, 9 Cir., 1944, 145 F.2d 348;
McDonald v. Johnston, 9 Cir., 1945, 149 F.2d 768;
Oddo v. Swope, 9 Cir., 1951, 193 F.2d 492;
Woollomes v. Heinze, 9 Cir., 1952, 198 F.2d 577.

The Supreme Court of the United States has definitely settled the question in *McNally v. Hill,* 1934, 293 U.S. 131, 137, wherein it says:

> "There is no warrant in either the statute or the writ for its use to invoke judicial determination of questions which could not affect the lawfulness of the custody and detention, and no suggestion of such use has been found in the commentaries on the English common law."

The judgment is affirmed.

APPENDIX B

Opinion of the United States District Court for the Northern District of California, Southern Division

(Filed October 22, 1954)

JOHN LEE, Petitioner,

vs.

EDWIN B. SWOPE, Warden, United States Penitentiary, Alcatraz, California, Respondent.

MEMORANDUM AND ORDER

The petitioner has filed an application for a writ of habeas corpus challenging the legality of a life sentence imposed by a United States Court Martial on September 13, 1949, upon conviction of the offense of conspiracy to commit murder. The petition states that the offense was committed while the petitioner was a prisoner in the custody of the United States Army at Camp Cooke, California, and after the petitioner had been dishonorably discharged from the United States Army.

The return to the order to show cause alleges, the accuracy of which petitioner concedes, that petitioner is imprisoned in the United States Penitentiary at Alcatraz, California, under and by virtue of a judgment and sentence of a General Court Martial approved on the 28th day of March, 1947, as modified by an order of the Secretary of the Army on the 16th day of April, 1949, sentencing the prisoner to a term of twenty years. It was this sentence that the petitioner was in the process of serving when the offense was committed at Camp Cooke, California, for which the life sentence was imposed. The petitioner does not challenge the validity of the twenty-year sentence, which the

records show was imposed for a crime committed by the petitioner when he was a member of the United States Army and while stationed in France. The return also shows that the expiration of the twenty-year judgment and sentence with part good time credit will occur on October 24, 1960.

It is obvious, therefore, that the petitioner is being detained by the Warden under a valid sentence. In this situation this Court is clearly without jurisdiction to hear the petition. It is only necessary to cite a few of the many cases which support this conclusion.

See: McNally vs. Hill, Warden, 293 U.S. 131; Dunlap vs. Swope, 9th Cir., 103 F.2d 19; Lopez vs. Swope, 9th Cir., 205 F.2d 8; and Butterfield vs. Wilkinson, 9th Cir., No. 14035, decided July 23, 1954.

The petitioner challenges the jurisdiction of the Army Court Martial over the offense at Camp Cooke. He contends he had been dishonorably discharged two years before the offense was committed and therefore the civil, not the military courts, had jurisdiction. His challenge to that sentence is pre-mature, and therefore this Court does not reach the merits of his petition.

Since this Court is without jurisdiction, it is

Ordered that petitioner's petition for a writ of habeas corpus be and the same is hereby dismissed without prejudice, and the order to show cause heretofore issued out of this Court is hereby discharged.

/s/ OLIVER J. CARTER,
United States District Judge

APPENDIX C

SWORN STATEMENT

I, Charlie W. Taylor, Jr., R/N 2285 RA 34532295, General Prisoner, Branch USDB, Camp Cooke, California, after having the 24th Article of War read to me, and after being told that it is not necessary for me to answer any questions that might tend to incriminate me, and that any statement made by me may be used against me, make the following statement:

I was to take a shower. So I pulled off all my clothes and the water was too hot at that time. I heard a door open and somebody was coming out that wasn't supposed to be out. Lee went up and told the Sergeant to let him out—three guys to clean up—Spasoff, Barnes and Coons. So I waited for the Sergeant. I was waiting for him to let them out. The water was too hot. He had to unlock the door to let them out. They all came out. I saw them with knives and I thought there was something. So I said, what was this. I was still upstairs then. I said, "Sergeant, get these guys up." And I figured when they looked at me—they said, "You started this stuff." I grabbed a chair and throw it in front of me. When I did this Barnes ran to me and he tried to stick me that time. He stuck me all right, but when I was holding him back, the other two guys came and Coons struck me with an iron pipe. So, when I fell, this guy Spasoff struck me when I fell. Then Barnes stuck me, then Spasoff, and they was hitting me too. Coons kept continually hitting me and Spasoff and this other boy was cutting me. The sergeant was standing by the gate telling them to break it up. After they hit me for a while, I said, "Fellows, give me a break. This isn't fair." I was laying down and the guy Coons hit me on the head and knocked me down. So I got up and when I went to get up they stuck me four or five

times, both Spasoff and Barnes stuck me. The sergeant let me out and then the Sergeant opened the door and he went to call for the doctor. I got as far as the door and then I fell down and then they called the doctor.

They had it planned, but I didn't know anything about it. But I heard them talking the night before. I heard some of the prisoners talking. This new sergeant came up and he hadn't been up there on duty in "I" block for a long time. So when he let them out, I was supposed to clean one side and Lee the other side. So he let me take a shower. And the water was hot. I called the sergeant who was upstairs opening the doors letting the other prisoners out. So I said, "What about getting me some cold water, sergeant?" And all the time these other guys was coming out, which they wasn't supposed to be out. *Lee had told the Sergeant to let these other guys out and they weren't supposed to be out. Lee was telling the sergeant to let them out and the Sergeant didn't know they weren't supposed to be out.* I was standing in my shorts—sitting on the top of the table, rather. I seen all these guys coming after me. So I said, "What's this?" Coons said, "I'm going to fuck you up. You started all this shit." I was where that big table is. I went back to the cage and started to get a chair to protect myself and I picked up the chair to stall them awhile. I said, "You guys want to fight, and we'll fight fair and get it over with." All of them said, "No, we are going to fuck you up." I blocked Barnes. Barnes rushed at me and took a swap at me with the knife and I blocked him. Coons hit me with an iron pipe, and Spasoff stuck me in the back when I stumbled. Then they began to cut and hit and hitting and cutting me at the same time. So I ran towards my cell. They hit me again. I got sick and wanted to throw up. *Lee was standing hollering—telling them to break it up, the sergeant was coming.* The sergeant was there all the time. I

told the sergeant when these guys were coming up, "These guys aren't supposed to be here." And the sergeant said, well, he didn't know and I stood there. That's when they started cutting me. *Lee told the sergeant to let them out, but he didn't do no cutting. But he told the guy to let them out. After they cut me, he told them to break it up. He told them to give me a break.* And then the sergeant tried to grab them. So the sergeant went out and finally decided to call up. When the sergeant went out to call up, they started again.

This was all because of the rules up there. The rule was for me and Lee to clean up and not to have any food up there. But they keep coffee up there from the chow all day and drink it and mess up the things up there in the block, spill it all over the floor. And I asked them about it. That's what got them mad. "I am going to pour all this coffee out," I told them. I didn't think nothing to it. And that's why they messed me up. Everybody is human and I was fighting everybody fair. I told Barnes this little colored kid up there, he is very scared. His name is Barney, something like that. Well, anyway, the other night, he was upstairs with them. One colored guy was up on the tier with these four white guys. I got up the other morning and the guys said all of these guys tried to set his bed on fire and burn him up. I told the sergeant, "There's going to be a race riot." Like there was going to be the same thing that happened to me. I told the sergeant, "You put this colored guy downstairs." But for the time being the Major wasn't here. The commander of the guard came by. So they moved him out there. So I told this guy, you tend to your business and don't bother the guys. So ever since then the ball has been rolling. Every night there would be some kind of junk. They are going to kill somebody, and they have been making knives there for the last week in their cells. Every night

you can hear them sawing. I didn't think it was for me. I don't want to be rattling and tattling, but this place is going —they are still making knives and everything all over the place.

Q. In connection with these knives, have you seen any of those knives?

A. I seen them that cut me today, I seen them.

Q. You haven't seen other knives?

A. I have seen guys with knives, but that's another case.

Q. Did you know of any definite information that something like that would happen to you?

A. Not to me, but I told everybody. I told the sergeant there was going to be a bad thing. I didn't know it was me. I have been waiting to catch Major Raven. This new Major, he doesn't even talk. I was going to talk to Major Raven before somebody gets hurt, but it just happened.

Q. Is there any definite cause for the colored boys and white boys having difficulty in the block?

A. That was the whole thing. They all wanted to get E. K. Johnson and Barney and I told them, "If you guys want to fight, we will just have it. If you all start the mess, we are going to call the commander of the guard or we are going to have a fight and the best man wins, because you guys have knives." I have been repeating that for about two or three weeks. So they put it on me.

Q. Do you know anything that would cause this trouble to lead up as it did?

A. Well, call it racial trouble. Well, you know two or three colored guys got out a while back. Everybody knows about that. Well, that's what I am saying. Everybody got their nose open. See, I don't never treat nobody wrong. If I am supposed to do anything for a guy, I do it, see. I don't do no more than that. They are mad at me because I won't gives anybody cigarettes or things. I don't give nobody

anything and they got mad at me and I didn't want to get in trouble by giving anything like that and that was what they are mad at me about. I am as surprised as you. I didn't know this was going to happen. The other night they told the boys—the sergeant told the guys take it easy with that noise.

Q. But you have heard them filing and sawing?

A. Yes.

Q. But that's the best you can give us on what happened prior to the incident and during the incident that happened? I mean, you can't think of anything that you could add about these three men jumping on you.

A. I was just thankful and lucky that I didn't get killed.

Charlie W. Taylor, Jr.
R/N 2285

A True Copy
Albert A. Davis
1st Lt. JAGC

Subscribed and sworn to before me this ____ day of June, 1949.

Arthur Salinger
Lt. Col., AGD
Summary Court

APPENDIX D

RECORD OF COURT COMMITMENT

Department of Justice
PENAL AND CORRECTIONAL INSTITUTIONS
UNITED STATES PENITENTIARY
(Institution)
ALCATRAZ, CALIFORNIA
(Location)

October 20, 1954
(copy)

By C.W. Sundstrom
Record Clerk, U.S.P.
Alcatraz, California

Inst. Name John Lee — No. 1014-AZ

Alias — Color White — Age 32 (4-25-22)

True Name John Lee — Name and number of prior commitments to Fed. Inst. 70798-A

Offense #1: Robbery & Assault w/D Weapon; #2: Murder — GCMO #84 & GCMO #72

District #1: ARMY - France; #2: USDB-Camp Cooke, Calif. ARMY - ASN 33 402 974

		Costs Fine	Committed Committed	Not Committed Not Committed	Paid Paid
Sentence	#1: 20 Years #2: Life				
Sentence changed	April 18, 1949	35 to 20 yrs on New term #1	Reason therefor	Army clemency rel	end term to 20 yrs.
Sentenced	#1 May 27, 1946 #2 Sept. 13, 1946		When arrested	Jan. 3, 1945	
Committed to Fed. Inst. (11-30-50-L as holdover)	Dec. 9, 1950 - Atlanta		Where arrested	Paris, France	
Sentence begins	#1: May 27, 1946 #2: Oct. 24, 1960		Residence	Pittsburgh, Pa.	
Eligible for Parole	Jan. 27, 1953 Oct. 23, 1975		Time in jail before trial		
Eligible for conditional release with good time	May 4, 1959 Life		Rate per mo. good time #1: 10	Total good time possible	1859 #1 sent 721 days all 2580 days total
Eligible for con. rel. with extra good time	Oct. 24, 1960				
Forfeited good time	7-19-46 11-28-49 & per 4/10-29-47 6-13-49		Amount forfeited	120 days MOT; 217 days 120 days MOT; 92 days	
Restoration good time			Amount restored		
Expires full term	#1: May 27, 1966 #2 LIFE				

Former Com. on Sentence to Other Institutions

Person to be notified in case of serious illness or death

No.	Name of Institution	Location
2230	USDB Army barracks	Camp Cooke, Lompoc, Calif.

Name: Mrs. Pauline Lee
Relation to prisoner: Mother
Address: 223 Eleventh St. Donora, Pa.
Telephone:

ACTION OF BOARD

Date	No. app.	Parole Forth.	Effect.	Rel.	Den.	Cont.	War. in.	Rev.	Dis. from par.	Releases and recommitments on present sentence other than parole: Date	Method
										10-16-47	Escaped custody
										10-17-47	Captured
										3-8-.3	trf.A. to Alcatraz

DETAINERS FILED

Date	Nature of Detainer	Notify Whom
	None listed	

FPI—LE—44-8—3M—7-1-1-1

U.S. No. 34131
Return [illegible] No. C
Filed OCT 2 [illegible]

APPENDIX E

United States Department of Justice
United States Board of Parole
Washington

October 26, 1955

Mr. Charles Upton Shreve
Attorney and Counselor at Law
716 Ford Building
Detroit 26, Michigan

Re: John Lee
Reg. No. 1014-AZ

Dear Mr. Shreve:

This acknowledges your letter of October 14, 1955, regarding the parole status of John Lee who is presently serving a General Court-Martial sentence on a Life term for Robbery and Assault with a Deadly Weapon and Murder.

Mr. Lee does not become eligible for parole on his Life sentence until 1975. Our Board has no jurisdiction to act until that time. You are probably aware of the fact that his case is reviewed annually by the Clemency Board in the Office of the Provost Marshal General, Department of the Army.

Sincerely yours,

THOMAS O. GROVER,
Parole Executive.

APPENDIX F

Article I, Section 8 (14), Constitution of the United States:

> "The Congress shall have power—To make Rules for the Government and Regulation of the land and naval Forces."

APPENDIX G

Amendment, Article V, Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

APPENDIX H

Amendment, Article VI, Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him, to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence."

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 599

JOHN LEE, PETITIONER

v.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A. 8-10, R. 68-70) is reported at 225 F. 2d 674. The opinion of the District Court (Pet. App. B. 11-12, R. 34-36) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 14, 1955 (R. 71). On November 29, 1955, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to January 11, 1956. The petition was filed on December 30,

1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTION PRESENTED

Whether petitioner, who is now serving a sentence by court-martial the validity of which he does not contest, may, by habeas corpus, challenge the validity of a second conviction by court-martial, sentence for which is to commence at the expiration of the sentence petitioner is now serving.

STATEMENT

Petitioner is now confined in the United States Penitentiary at Alcatraz under a sentence of general court-martial, approved March 28, 1947, as modified by the Secretary of the Army on April 16, 1949, sentencing petitioner to a term of twenty years (R. 11-21). That sentence with credit for good time will not expire until October 24, 1960 (R. 10). The validity of that sentence is not contested.

On September 13, 1949, petitioner was convicted by court-martial of conspiracy to commit murder on June 10, 1949, while confined under the above sentence in the army disciplinary barracks at Camp Cooke, California. On that conviction he was ultimately sentenced to life imprisonment to commence at the expiration of the twenty-year sentence. (R. 10). Petitioner had been dishonorably discharged from the army under his first sentence on June 12, 1947 (R. 10).

In October, 1954, petitioner filed in the United States District Court for the Southern District

of California a petition for a writ of habeas corpus attacking the validity of his second court-martial conviction on the ground that, in view of his dishonorable discharge, he was not subject to military jurisdiction at the time of that offense (R. 3-7). The District Court dismissed the writ as premature since petitioner was not being held under the sentence which he was attacking (R. 34-36). The order of the District Court was affirmed on appeal (R. 71).

ARGUMENT

The holding of the courts below that the instant petition for habeas corpus is premature since petitioner is not being held in custody under the sentence which he is attacking is in accord with the principles established by this Court in *McNally* v. *Hill*, 293 U. S. 131, where a writ of habeas corpus was held unavailable to a prisoner serving an admittedly valid sentence as a means of attacking a consecutive sentence on another count which he had not yet begun to serve. This Court there held that the writ of habeas corpus may not be used "as a means of securing the judicial decision of any question which, even if determined in the prisoner's favor, could not have resulted in his immediate release." 293 U. S. at p. 138. In the *McNally* case, as here, the argument was advanced that the additional future sentence which was under attack prevented the Parole Board from considering an application for parole under the valid sentence. (293 U.S. 134). The Court held that habeas corpus was

nevertheless unavailable, stating (293 U. S. at p. 140):

> The petitioner asks here only a ruling which will establish his eligibility for parole, because of the invalidity of the sentence on the third count. The ruling sought is such as might be obtained in a proceeding brought to mandamus the Parole Board to entertain his petition for parole, if the sentence on the third count were void for want of jurisdiction of the court to pronounce it. This use of *habeas corpus* is unauthorized by the statutes of the United States, * * *.[1]

This ruling has been consistently followed by the Courts of Appeals. *Holloway* v. *Looney*, 207 F. 2d 433, 434 (C. A. 10) certiorari denied, 346 U. S. 912; *McIntosh* v. *Steele*, 184 F. 2d 721, 722 (C. A. 8), certiorari denied, 340 U. S. 921; *Teramine* v. *Shuttleworth*, 151 F. 2d 602 (C.A. 6), certiorari denied, 327 U. S. 784; *Pope* v. *Huff*, 117 F. 2d 779 (C.A. D.C.), certiorari denied *sub nom. Pope* v. *Curran*, 314 U. S. 669; *Mahoney* v. *Johnston*, 144 F. 2d 663, 664 (C. A. 9), certiorari denied, 324 U. S. 853; *Johnson* v. *Aderhold*, 73 F. 2d 102 (C. A. 5).

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[1] Petitioner's attack on the jurisdiction of the second court-martial is without foundation. In *Kahn* v. *Anderson*, 255 U.S. 1, this Court held that a person in the status of petitioner at the time of the second offense, *i.e.*, a military prisoner held in military confinement, could be tried by court-martial even though he had previously been discharged from the military service under the first sentence. The Court recognized that holding in *Toth* v. *Quarles*, 350 U.S. 11 at p. 14.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY, 1956.

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